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No. 205

In the

Supreme Court of the United States

OCTOBER TERM, 1961

J. W. FREE,

Petitioner,

v.

JAMES F. BLAND,

Respondent.

On Writ of Certiorari to the Supreme Court of Texas

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

OPINIONS BELOW

The statements in this connection at page 2 of Brief for Petitioner are correct.

JURISDICTION

It is submitted that this Court does not properly have jurisdiction herein, and that the writ of certiorari should be dismissed as improvidently granted, since no Federal question is really involved and, regardless of the construc-

tion of the Treasury Regulations, they have not been violated or disregarded by the judgment of the District Court as reinstated by the Supreme Court of Texas.

QUESTION PRESENTED

Whether the wife's estate may have a claim for reimbursement or reconvention against the surviving husband under state community property law, where the husband has used community funds to purchase savings bonds in the names of himself "or" his wife, so that upon her death the bonds will be recognized as his property by the Treasury Department.

STATEMENT

J. W. Free purchased U. S. savings bonds with community funds without his wife's knowledge and consent, in the names of himself "or" his wife; the wife died and her son and legatee J. F. Bland duly qualified as her executor (R. 1).

Petitioner Free sought a declaratory judgment that he was sole owner of the bonds. Respondent filed a cross-action asserting that he owned a one-half interest in the bonds or, in the alternative, that he was entitled to a money judgment for reimbursement or reconvention to the wife's half of the community because of the purchase of the bonds with community funds without her knowledge or consent (R. 22). Free filed a motion for summary judgment (R. 5), but the only affidavit attached thereto was that of his attorney (R. 7) which does not assert that there was any knowledge or consent on the part of Mrs. Free, nor is there any pleading of such knowledge or consent.

In ruling upon the motion, the District Court did not sustain Respondent's claim of the ownership of an interest in the bonds, but rendered judgment for Petitioner "adjudging him to be the owner of the U. S. Government Bonds sued for herein," and specifically ordering, adjudging and decreeing "that the plaintiff, J. W. Free, do have and recover of and from the Defendant, James F. Bland, Individually and as Independent Executor of the Estate of Ida Free, deceased, judgment for the title to and possession of the U. S. Government Bonds" (R. 28). It was declared that, "The Court, having considered the pleadings on file and the affidavits, finds that they show an absence of any genuine issue as to any material fact," and the Court went on to render a money judgment for Respondent for a sum equal to half the value of the bonds in repayment to the wife's half of the community estate because of the use of community funds for the purchase of the bonds. The Court of Civil Appeals affirmed the judgment, declaring Petitioner to be the owner of the bonds and awarding title and possession to him, but reversed the money judgment to Respondent (R. 37). The Supreme Court of Texas in turn reinstated and affirmed all of the judgment of the trial court, the awarding of title and possession of the bonds to Petitioner and of the money judgment to Respondent (R. 54).

Petitioner errs in stating that his claim to ownership of the bonds was rejected and Respondent's claim to one-half of the bonds upheld; in fact, Petitioner's claim to ownership of the bonds was sustained and Respondent's claim to ownership of one-half of the bonds was rejected, but Respondent

as representative of the deceased wife's estate was allowed a money judgment by way of reimbursement for her portion of the community funds which were used to purchase the bonds, without her knowledge or consent, in accordance with his alternative plea of constructive fraud. Again contrary to the statement in Petitioner's Brief, it does not follow from the action of the Supreme Court of Texas and was not held by that Court that savings bonds "purchased by husband and wife with community property and registered in their names as co-owners, would on the death of one be treated in Texas not as property of the other, as provided by the Treasury Regulations, but as community property belonging half to the surviving spouse and half to the estate of the deceased spouse." It was expressly adjudged that the bonds belonged in their entirety to the surviving spouse who alone was vested with title and possession thereof, but reimbursement to the wife's estate for her share of the funds going into the purchase was allowed.

SUMMARY OF ARGUMENT

I.

The Treasury Regulations by their own terms do not purport to be determinative of the property rights of ownership but rather of the Department's recognition of ownership and payment of proceeds.

II.

Even if the Regulations be interpretated as determinative of ownership rather than the Department's recognition and treatment of ownership, still the Texas courts have deter-

mined ownership of the bonds in full accord with the Regulations, giving judgment for the title to and possession of the bonds to Petitioner, and the allowance of a right of reimbursement of the community for the use of community funds does not conflict therewith; the Regulations clearly do not purport to control accounting between estates of husband and wife with respect to marital rights of reimbursement or adjustment for use of community funds.

III.

The judgment here does not conflict with the cases cited by Petitioner, and many of those very cases recognize that a constructive or resulting trust, an equitable lien, or a right of reimbursement is something apart from and not in conflict with recognition of absolute title in a surviving co-owner.

IV.

Respondent in the District Court in the alternative to his plea of ownership of a one-half interest in the bonds pleaded constructive fraud entitling the wife's half of the community to reimbursement for the purchase of the bonds with community funds and registration in co-owner form without her knowledge or consent, and the law of Texas recognizes such constructive fraud in the absence of actual wrongful intent, the requirements for such constructive fraud properly being a matter of state law and not a Federal question.

ARGUMENT

This is a singularly inappropriate case for certiorari as to precedence between Treasury Regulations and state law

since the judgment here does not refuse to give effect to those regulations but is consistent with them even if they are construed as determining ownership, and since the Supreme Court of Texas wrote no full-dress opinion in the present case at all, but merely referred to its opinion in *Hilley v. Hilley, 342 S. W. 2d 565*, which itself involves only corporate stock and not U. S. Bonds. Whatever the interpretation of the Regulations, the judgment here is not in conflict, and even if they control ownership, they do not concern matters of accounting or reimbursement between the estates of husband and wife for use of community funds. What is sufficient to constitute constructive fraud in Texas as a basis for such adjustment or reimbursement is surely a proper matter for determination by the state courts and not by this Honorable Court.

I.

The wording of the Regulations is not in terms of establishing ownership, but rather of establishing the Department's treatment and recognition of ownership. Thus, the statement in Sec. 315.5 that the form of registration "will be *considered as* conclusive of such ownership and interest," being in a Treasury Regulation, plainly means that it will be so considered by the Treasury Department. It does not state "will be conclusive," but pointedly uses the words "considered as." Sec. 315.20 does not state that no judicial determination can defeat or impair the rights of survivorship but merely that no such determination "will be recognized," clearly meaning recognized by the Department. Sec. 315.61 does not state that "the survivor *will be* the sole and

absolute owner," but rather "the survivor *will be recognized as* the sole and absolute owner," obviously referring to recognition by the Department for payment or reissue, particularly since it is stated immediately following, "Thereafter payment or reissue will be made as though the bond were registered in the name of the survivor alone," with further requirements given as to proof to be presented.

The history detailed in the Amicus Curiae Brief bears this out, and while the wording has variously been that "the surviving co-owner will be recognized by the Treasury Department as the sole and absolute owner of the bond," and "the surviving co-owner will be recognized as the sole and absolute owner of the bond," it has never been "the surviving co-owner will be the sole and absolute owner of the bond."

While the administrative interpretation may be relevant in case of ambiguity, it cannot override the clear meaning of the words used. *73 C.J.S., Public Administrative Bodies and Procedures, Sec. 106*, after recognizing the role of administrative construction in case of ambiguity, goes on to say:

> "On the other hand, where the meaning of the words used in an administrative rule or regulation is not in doubt, or where the language used is not technical, the court need not necessarily look to the administrative construction thereof; nor is such construction conclusive on the court."

Words such as "recognized" and "considered" are not technical and clearly mean just what they say. The C.J.S. quotation is supported by such authority as the opinion of this Court in *Brown & Sons Lumber Co. v. Louisville & Nashville RR., 299 U. S. 393.*

In *State v. Gettinger, 105 N. E. 2d 161 (S. Ct. of Ind.)*, it is stated:

> "• • • but rights created or benefits conferred by an administrative rule should not be extended by interpretation beyond the plain terms of the rule itself. 42 Am. Jur., Public Administrative Law, Sec. 101, p. 431. To do so would be to create rules by interpretation, thus defeating the legislative requirement that rules may be adopted only by compliance with required formality. • • • • Moreover, where as here, the meaning of the rule is not doubtful, or the language technical, we need not look to the administrative construction of it."

See also *Department of Insurance v. Church Members Relief Ass'n., 26 N. E. 2d 51 (Ind.); Bowles v. Dairymens League Co-op. Ass'n., 61 F. S. 358 (D. C.); etc.*

II. and III.

If the Regulations establish ownership and not merely the Treasury's recognition thereof, still the judgment here is not in conflict since it awards ownership, title, and possession to the survivor. Certainly the Regulations do not purport to determine rights of reimbursement between the estates of spouses for the use of community funds, nor to make any rules of law about accounting or adjustment for funds used in purchase of the bonds, as opposed to the right to the bonds themselves and their proceeds. Indeed, the statutory authority would not extend to such an attempt, since this is not part of the "terms and conditions" subject to which the bonds are issued, which the Secretary is authorized to prescribe.

Even the cases cited by Petitioner and the Amicus Curiae recognize the distinction between title to bonds and rights arising with reference to the funds used for their purchase. We will not here repeat the argument in this connection contained in our Brief in Opposition to Certiorari, pp. 6-11, but adopt it here by reference, and mention merely additional authorities to such effect.

Thus, in *Bell v. Killian, 92 So. 2d 769 (Ala.)*, where funds left to a widow for her support only were invested by her in U. S. bonds in co-ownership form, on her death it was held that the court could not impose a trust directly on the bonds in favor of the remaindermen, but it could decree a constructive trust as to the proceeds. In *Succesion of Geagan, 33 So. 2d 118 (La.)*, the named beneficiary was recognized as the owner of the bonds, but with a claim recognized in the purchaser's widow for one-half the value in reimbursement of her community interest in the funds used for the purchase. In *Succession of Land, 31 So. 2d 609 (La.)*, the court recognized that bonds payable to Mrs. Land or her daughter were governed by the Regulations, that on the death of one co-owner the survivor would be recognized as the sole and absolute owner, but held that this did not foreclose all rights other than ownership:

> "The district court gave full force and effect to the laws and regulations governing United States War Savings Bonds, and recognized Mrs. Triplett as the owner of these bonds, but reserved the right of John R. Land, Jr. to claim his full legitime and to claim collations because of these gifts. We find no error in this ruling."

Katz v. Driscoll, 194 P. 2d 822 (Cal.), cited by both Petitioner and Amicus Curiae, declares:

> "While the cases above cited hold that as between the Government and the survivor or beneficiary of the bonds and all other claimants the courts will recognize only the survivor or beneficiary, there is no case that holds that where the bonds are the result of fraud, the person defrauded cannot pursue the proceeds of such bonds in the hands of one who is a party to the fraud."

Where a daughter during the mother's life assigned all her interest in U. S. savings bonds registered in their names as co-owners, *In Re Hendricksen, 56 N. W. 2d 711 (Neb.)*, held that the executor of the mother's estate was entitled to the proceeds of the bonds which the daughter as surviving co-owner had cashed, and that no Federal law or Treasury Regulation was affected by such decision.

Henderson's Adm'r v. Bewley, 264 S. W. 2d 680 (Ky.), declares a constructive trust in favor of a husband in bonds purchased by the wife with joint funds without his knowledge or consent and registered in her name and that of others as co-owners, although recognizing that under the contract with the Treasury only the surviving payees could receive payment.

Petitioner deprecates the case of *Decker v. Fowler, 92 P. 2d 254 (Wash., 1939)*, on the ground that it was "promptly repudiated by state legislation," but overlooks the fact that even after such legislation, *In Re Allen's Estate, 343 P. 2d 867 (S. Ct. of Wash., 1959)*, continued to hold that the regulations making registration conclusive of ownership did not govern all rights concerning the funds going into the pur-

chase, and quoted *Anderson v. Benson, 117 F. S. 765 (D.C., Neb.)*, as holding that the owner of property could not be deprived of it by the wrongful purchase of Government bonds, so that rights of reimbursement could exist aside from the question of ownership of the bonds.

The question with respect to reimbursement for use of community funds is not the same as that of testamentary disposition or descent and distribution or the like, which do go to ownership.

We do want to mention again the case of *In Re Schubert, 63 N. Y. S. 2d 27*, discussed in our Brief in Opposition, because of its very close analogy to the present situation. There partnership funds were used to purchase U. S. savings bonds in the names of the partners as co-owners. On the death of one, it was held that title and the right to possession of the bonds was in the survivor, but that upon proof that partnership funds went into the purchase, the value of the bonds could be taken into consideration in an action for an accounting. The marital community is a form of partnership between the husband and wife ("The relationship of husband and wife toward the community property is that of a partnership." *Simpson v. Brotherton, 62 Tex. 170*), and the judgment here merely takes into consideration the use of community funds in the purchase of the bonds in an accounting between the respective community interests of the spouses. This is by no means in contravention of the Treasury Regulations.

The marketability of U. S. bonds is not affected by the judgment here. The "simple and direct method of automatically transferring ownership upon death" still exists, and its attractiveness to purchasing husbands is not diminished. However, it is not the object of the Treasury nor the usual inducement to the purchaser that the bonds be used as a means of depriving the wife's estate of any share of funds in which she has an interest, without her knowledge and consent, or to provide a means of fraud, actual or constructive. It is not such a motive that promotes the sale of U. S. bonds, and if such a motive should exist, certainly it should not be the policy of the Government of the United States to foster it.

As the Amicus Curiae Brief speaks of the competitiveness of Treasury bonds with joint savings bank accounts, we should note that statutes providing that the survivor shall have power to act in all matters respecting such accounts and to receive payments are held to be for the bank's protection and not determinative of the possible rights of others against a survivor who has collected such funds. *Reed v. Reed, 283 S. W. 2d 311 (Tex. Civ. App.); Pruett v. First National Bank, 175 S. W. 2d 658 (Tex. Civ. App.); Jones v. Neu, 150 N. E. 2d 858 (Ohio); Seymour v. Seymour, 85 So. 2d 726 (Fla.); Woodward v. Auyong, 34 Hawaii 597; Powell v. Powell, 263 S. W. 2d 708 (Ark.);* etc. Thus the Treasury is not being put at any competitive disadvantage.

It has also been held that the Postal Savings Law provision, *39 U. S. C. A. 754*, that deposits made by a married woman should be "in her own name and free from interference by her husand," permits payment to the married woman

depositor but that the Postal Savings Department is not concerned with rights of recovery thereafter against depositors who have received payment. *Zorich v. Zorich, 88 N. E. 2d 694 (Ind.); Reed v. Reed, 283 S. W. 2d 311 (Tex. Civ. App.);* etc.

IV.

Respondent in his cross-action expressly pleaded for reimbursement on the ground of constructive fraud, and on this ground only, in the alternative to his allegations of ownership of a one-half interest in the bonds, and urged the contention in his Application for Writ of Error (R. 42). Petitioner points out that the husband has general authority to manage and dispose of community property in Texas. However, although he may give or convey it to third persons, he may not give or convey it to himself or his estate; moreover, the limitation as to fraud includes constructive fraud as well as instances of actual wrongful intent. As stated in DeFuniak, *Principles of Community Property, Sec. 119,* "There is not always a necessity of proving an actual intent to defraud or an improper motive on the part of the husband."

Petitioner repeatedly makes an analogy to insurance situations, and it should be noted that in this field a distinction is recognized between right and title to the proceeds and possible rights of reimbursement, and between the husband's gift or transfer of community funds to others and such action in favor of himself or his own estate.

Thus, in *Warthan v. Haynes, 288 S. W. 2d 481*, cited by Petitioner, as well as in *Volunteer State Life Ins. Co. v. Hardin, 197 S. W. 2d 105*, the Supreme Court of Texas, while holding that ownership of the policy proceeds was in accordance with the designation of beneficiary, took pains to point out that it was not passing upon the possible rights of the parties to reimbursement for cash surrender values. The *Warthan* opinion, after holding the proceeds to belong to the separate estate of the husband, also goes on to say, "Nothing in this opinion, however, is to be construed as holding that in case of actual *or constructive fraud* upon the wife, beneficiary designations by the husband will preclude her or her estate from obtaining relief." *Martin v. Moran, 32 S. W. 904*, still frequently cited, declares that while the husband might properly expend community funds for policies payable to third persons, he is not entitled to make them payable to his estate, saying, "The husband can give his interest in the community property to another, but he cannot give his wife's interest to himself." Of this case the *Warthan* opinion states, "If, as it seems to be, the basis of that decision was, that for the husband, under certain circumstances, to pay premiums out of community and to make the proceeds payable to his estate, amounts to fraud upon the wife, it would not necessarily run counter to that of *Volunteer State Life*."

Kemp v. Metropolitan Life Ins. Co., 205 F. 2d 857, considering Texas law as to policies with premiums paid by community funds, quotes Speer, *Law of Marital Rights in Texas, 3rd Ed., p. 203:*

> "His conveyance or disposition of the community may be a legal fraud upon her rights though not intended

> to wrong her. There may be an utter absence of intended fraud, yet the transaction be voidable."

In *U. S. v. Rompel, 326 U. S. 367*, this Court pointed out that it was conceded as to the Texas law, and properly so, "that malicious and fraudulent intent need not be established in order that the wife shall have the remedies referred to."

Speer further states in the same section (Sec. 150) as the above quotation:

> "A cause could arise, however, where the husband might so employ the community property in the acquision of other property, as an insurance policy, so as to make the new acquisition his separate property, or the property of still another, and yet he and his estate become liable to the wife for the funds of the community used."

Petitioner also overlooks that he failed to raise properly an issue of fact that the wife had knowledge or gave consent, as the only affidavit attached to his motion, that of his attorney, did not assert such to be true, and there is no pleading of such knowledge or consent, although as plaintiff he had the burden of pleading and proof. It should further be remembered that the judgment of the district court expressly declares (R. 28) that "The Court, having considered the pleadings on file and the affidavits, finds that they show an absence of any genuine issue as to any material fact."

What is necessary for constructive fraud under the Texas law and what state of the record creates a fact issue are properly matters for determination by the state courts and surely do not present a Federal question.

CONCLUSION

The Writ of Certiorari should be dismissed as improvidently granted, or in the alternative, the judgment of the Supreme Court of Texas recognizing the ownership of U. S. savings bonds in the surviving co-owner in accordance with the Treasury Regulations, but allowing a money judgment in adjustment between the community estates of husband and wife for the use of community funds, should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the day of , 1962, I served true and correct copies of the foregoing Brief for Respondent upon Petitioner by depositing the same in the United States Post Office with first class postage, prepaid and addressed to Gerhard A. Gesell and W. Graham Claytor, Jr., 701 Union Trust Building, Washington 5, D. C., and Edwin M. Fulton and Hollie G. McClain, Box 500, Gilmer, Texas, attorneys for Petitioner.

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